

Validity of arbitration clauses incorporated by reference into bill of lading

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1 INTRODUCTION

Most of charter party agreements are concluded in standard contracts. Those standard conditions are often used in international trade. The main characteristic of the standard conditions is that the parties contract upon pre-printed documents, containing pre-existing conditions, rather than discussing each and every term of their agreement. Therefore the standard contracts present some questions of consent. Whether or not the party accepting the others pre-printed conditions has agreed to all the conditions of the document.

The question of consent becomes even more complex when the pre-printed conditions of the *charter party* are intended to be incorporated by reference in another document, the *bill of lading*. The reason lays on the fact that the terms agreed by the charterer and the carrier are rendered to be applicable to a third party. Whether or not the third party consents to all the terms of the charter party is highly questionable by virtue that he is not a party to the charter party.

However, the third party may be bound by the terms of the charter party if the terms are “brought over” from the charter party into the bill of lading. A successful incorporation may be granted depending on whether or not the third party has actual or constructive notice of the incorporation and the reference is worded quite broadly in order to germinate in the legal relationship between the carrier and the third party.

Among the terms of the charter party there is usually an arbitration clause. The incorporation of the arbitration clause is not guaranteed even if those conditions mentioned above are met. The reason lays on the fact that most legal systems make a distinction between the arbitration clause and other clauses in the contract. Some legal systems have stricter form requirements at the time of considering party’s valid consent to such arbitration clauses. Under this reason the arbitration clause may fall outside of a valid arbitration agreement.

At first sight the requirement of form of the arbitration agreement among the legal systems lacks harmonization nowadays. Most legal systems require an arbitration agreement “in writing”, however, the definitions of an arbitration agreement “in writing” are unlike. The definition ranges from an arbitration clause in a contract signed by both parties to a tacit acceptance of the arbitration agreement.¹ Furthermore, some countries do not require any form for the arbitration agreement i.e. the Swedish Arbitration Act² Therefore, the conditions for the validity of arbitration clauses incorporated by reference into bill of lading may vary among the legal systems. The thesis discusses what conditions such arbitration clauses should meet in order to comply with the definition of an arbitration agreement “in writing” according to the legal systems.

Whether or not the arbitration clause incorporated by reference into the bill of lading is valid among the legal systems is intrinsically related to the New York Convention 1958. The Convention ensures that an arbitration agreement will be recognized by mostly of the legal systems. However, recognition of the arbitration agreement is guarantee if the agreement complies with the form requirement provided by the Convention. Whether the arbitration clauses incorporated by reference comply with the criteria of a written arbitration agreement under the Convention will be an issue addressed in the thesis.

In relation to the issue of the form of the arbitration agreement, the thesis shall address the process that has been taking place in the past twenty- years on the desire to answer current needs of the international trade. The form of the arbitration agreement is subject to scrutiny currently. The legal systems are enacting laws with more lax requirements of form than the New York Convention. In addition, the New York Convention has been subject to a liberal interpretation in relation to the form of the arbitration agreement. In the light of this change we will analyse the consequences of this process and the uncertainties that the validity of the arbitration clauses in bill of lading may encounter.

¹ Van den Berg, Albert. *The New York Arbitration Convention of 1958*. Kluwer Law and taxation publisher, Deventer/Netherlands, 1981. p. 172

² Moss, Giuditta Cordero. *Risk of conflict between the New York Convention and the Newer Arbitration friendly National Legislation?*, Stockholm Arbitration Report, 2003:2, p. 5

The unpredictability within the form of the arbitration agreement among the legal system may have an impact at both stages of enforcement. When a Court is called upon to recognize an arbitration agreement and refer the parties to arbitration or when the court is requested to enforce an arbitral award. How would affect the not compliance with the form of the arbitration agreement? What type of hindrances the party relying on an arbitration clause incorporated by reference into the bill of lading may encounter when a court is called upon to establish the jurisdiction. Finally, would the not compliance with the form of the arbitration agreement affect the enforceability of an award base on such clauses. Those issues should also be answer at the end of the thesis.

Choosing the topic

At first sight the topic caught my interest. The topic converge the three areas of law that I like the most Contract law, Private International Law and Maritime Law. My enthusiasm grew during the research because I realized the significant of the topic. The topic verifies from its humble position the impact that the evolution of the international trade is having in the areas of law. Arbitration is becoming the rule in the international trade while in the past it used to be the exception. Therefore, the legal systems are setting aside the form of the arbitration agreement with the aim of facilitating arbitration. The harmonization achieved by the New York Convention is being challenge by this process. The topic involves issues that are currently under tension among the legal system making the topic a very interesting discussion.

Delimitation of the subject

The thesis concerns with the validity of arbitration clauses in charter party incorporated by reference into the bill of lading. The aim of the thesis is to examine the validity of the arbitration agreement in relation to the form of the arbitration agreement. The thesis gives an overlook of the definition of arbitration agreement “in writing” among the legal systems. Whether or not the arbitration clauses incorporated by reference into the bill of lading falls inside of those definitions.

Furthermore, the thesis analyses whether or not those arbitration clauses are binding upon the third party. The third party for the purposes of the thesis means: “a shipper who is not the charterer” or “an endorsee of the bill of lading who is not the charterer”³. I may mention the relationship between the charterer and the carrier but only to illustrate some contrast with the relationship carrier-third party. The charterer/shipper means the charterer in the thesis.

It is out of scope of the discussion the issue of arbitral procedure and jurisdiction problems. The thesis will only illustrate by assumptions the consequences of non-compliance with the written form requirement of the New York Convention at the stage of enforcement of the arbitration agreement and stage of enforcement of the award.

Structure of the thesis:

The thesis consists on four chapters.

Chapter I contains the introduction. The introduction has the presentation of the topic, the issues to be address in the thesis, the delimitation of the thesis subject, the legal sources, method and finally the significance of the study.

Chapter II describes the issues arising from the arbitration clauses in charter party incorporated by reference into bill of lading. Chapter II includes the conditions to bring over the arbitration clause into the bill of lading and the tacit acceptance by the third party. In addition, there is a classification between legal systems that consider valid a tacit acceptance of the arbitration agreement and legal systems that requires an express consent to the arbitration agreement.

Chapter III contains the issue of incorporation of arbitration clauses by reference according to the UNCITRAL Model Law 1985 and the legal systems that have adopted its principles. In addition, Chapter III examines the topic according to the English Arbitration Act 1996. A presentation of the relevant English court decisions is included within the scope of the discussion.

³ Falkanger, Thor; Bull, Hans Jacobs. *Maritime Law the Scandinavian perspective*. Oslo, 2004. page 388

Chapter IV analyzes the New York Convention form requirement under Art. II(2). In addition, Chapter IV describes the different interpretations that the court of the contracting States has given to Art. II(2).

Finally, Chapter IV includes within the scope of the discussion, the consequences of the not compliance with the form requirement of Art II(2). Chapter IV illustrates the consequences of the disparity of form among the legal systems at both stage of enforcement. At the first stage of enforcement when the party relies on the arbitration clause for a stay and at the stage of enforcement of the awards.

1.1 Sources

International Conventions

The New York Convention 1958 was adopted by the United Nations Conference on International Commercial Arbitration on the 10 of June 1958. The Convention is the United Nations treaty for the recognition and enforcement of arbitration agreements and foreign awards. The treaty has been world wide ratified by more than 130 countries.

The Convention establishes the grounds for refusal of enforcement of the arbitration agreements and enforcement of the arbitral awards.

The thesis examines the Convention of carriage of goods by sea known as “the Hamburg Rules 1978”: The Convention was drafted by the UNCTAD, the Commission of the United Nations in transport of goods. The Hamburg Rules has provides with rules on jurisdiction and arbitration. Furthermore, the Hamburg Rules establishes the conditions that should be met in order to invoke against the third party the arbitration clause.

National legislation

The English Arbitration Act 1996,(Thereafter EAA) was enacted on 17 of June 1996. Prior to the enactment of the EAA Act 1996 case law has developed a recognize line of authority about arbitration clauses incorporated by reference into the bill of lading.

In addition, the thesis mentions other rules on Arbitration enacted in the different legal systems. The purpose is to illustrate how the states have regulated the form of the arbitration agreement.

Case law:

Case study is an important source that provides us with a guideline among the different legal systems. We will implement case study to illustrate how the Courts have solved the issue of incorporation by reference. The cases have been chosen in order to highlight the differences among the legal systems. Therefore, Case law mentioned in the thesis does not belong to a particular country except when the thesis discusses the English legal systems.

Other sources

The UNCITRAL Model Law 1985 on International Commercial Arbitration (thereafter UML) was adopted by the United States Commission in International Trade on 21 June 1985. The UML is a template addressed to the legislators of the different countries. The UML has two purposes to modernize State's legislation on international arbitration and to harmonize the legal systems of the different States. UML has been a successful instrument adopted by more than 40 countries. The UML has been adopted in full text or has served as inspiration for State's national legislation on arbitration.

Other Source relevant is the latest proposal of the Commission on international trade. The thesis will present the drafts of the United Nations Working Group II in arbitration and Working Group III in transport law. Both proposals of these working groups serve us as a guideline about the tendency that the topic of the thesis is taking.

1.2 Aim and Method

The purpose of the thesis is to verify the validity of arbitration clauses incorporated by reference into the bill of lading in order to answer whether or not those arbitration agreements bind the third party.

The validity of the arbitration clauses is intrinsically related to the form of the arbitration agreement. The form of the arbitration agreement may be regulated by each national arbitration law. Each national arbitration law may have their own form requirement that may differ from other national laws in arbitration. If the form of the arbitration agreement is unpredictable among the legal systems, serious issues may arise. An arbitration agreement will not be considered valid cross-borders. The party protected by an arbitration agreement that complies with the form according to its national law may not be able to enforce this arbitration agreement in other countries that not recognize such a form.

Therefore, the form requirement for the validity of arbitration agreement should be coordinated among the legal systems. The coordination is achieved if the national legislation is harmonized. The harmonization is accomplished by international conventions that uniform the rules among the legal systems. The uniformity within the form of the arbitration agreement was brought by the New York Convention. However, this uniformity is being challenged by the legal systems currently. The convention may be subjected to an autonomous interpretation by the Courts of the contracting states. An autonomous interpretation of the New York Convention may lead to a lack of harmonization among the legal systems.

This lack of predictability in the interpretation of the New York Convention was intended to be solved by the United Nations Commission in International Trade. The UNCITRAL Model Law 1985 was adopted by the U. N. with the purpose of providing harmonization in the interpretation of the New York Convention. However, the countries have adopted the Model Law with modifications to the form requirement.

There is not consensus among the legal systems about the form required to consider valid an arbitration agreement. A comparative method among the legal systems will make us aware about the differences within the form requirement between the legal systems. The thesis gathers the principles that govern the form of the arbitration agreement among the legal systems. Thereafter harmonizes them by a series of assumptions.⁴

⁴ Moss, Giuditta Cordero *International Commercial Arbitration*. Oslo, 1999p. 63

2 Arbitration clauses in charter party agreements incorporated by reference into the bill of lading

2.1 The conditions to “bring over” the arbitration clause into the bill of lading

The parties to the charter party are charterer-carrier the charter party governs their legal relationship. A bill of lading in charterer's hands has the function of a mere receipt of the goods. When the carrier issues a bill of lading to a third party, the bill of lading becomes the evidence of the contract of carriage between the carrier and the third party.

Consequently, the charter party and the bill of lading become two distinct documents that have rights and obligations which bind different parties.

The original parties to the charter party may intend to incorporate terms of the charter party into the bill of lading. The incorporation of the charter party terms may be accomplished by making a reference into the bill of lading to the charter party. Among the terms intended to be incorporated there may be the arbitration clause. The purpose of the reference may be to bind the third party to the arbitration clause in the charter party. The question that arises is what conditions should the reference meet in order to bring over the arbitration clause from the charter party into the bill of lading. The answer to this question is intrinsically related to issue of third party consent. Whether or not was the third party 's intention to be bound by the arbitration clause. Furthermore, whether or not the third party knew or should have known that the arbitration clause in the charter party was intended to bind him. The third party's awareness of the arbitration clause should be made by the construction of the document that he is party to.

The starting point is the construction of the bill of lading. The wording of the reference is relevant in order to make aware the third party about the arbitration clause. There are mainly two ways of incorporation by reference in shipping trade. One way is by making a general reference to the charter party without specifically referring to the arbitration clause e.g. “*all condition as per charter...*”. The other way is by making an specific reference of the arbitration clause in the bill of lading e.g. “*all terms, clauses, conditions and exceptions, including the arbitration clause... of the charter party...are hereby incorporated*”⁵.

⁵Siig, Kristina. Arbitration Agreements in a Transport Law Perspective. Oslo, 2002 p. 351

If an arbitration clause is incorporated by general words, the third party's awareness of the arbitration clause is highly questionable. The third may not have knowledge of the existence of an arbitration clause in the charter party. He is not a party to the charter party therefore he may not have access to the charter party. Furthermore, the third party may not be aware that the arbitration clause is intended to be binding upon him.

Whether or not the third party had the intention to be bound by the arbitration clause is a question of reasonable notice. The reference should be written clearly and broadly in the bill of lading in order to ensure that the third party has knowledge of the consequences of the incorporation. Moreover, the reference should make clear that the arbitration clause in the charter party is intended to germinate in the legal relationship arising from the bill of lading. The third party by exercising reasonable diligence should have been aware that by accepting the bill of lading he may become bound by the arbitration clause in the charter party.

The majority of the national courts seem to have the opinion that only a specific reference to the arbitration clause ensures that the third party knew or should have known of the arbitration clause. The court of appeal in Barcelona expressed the following in that respect:⁶

“... the arbitration clause contained in the charter party could not be invoked against the party which had signed the bill of lading because the bill of lading contained only a general reference to the charter party. In the Court's opinion, the general reference was incapable of validly incorporating the arbitration clause contained in the charter party into the bill of lading. The court reasoned: 'the charter party and the bill of lading are two distinct contracts which bind different parties: owner and charterer on the one hand, and carrier and shipper on the other, and both have a different legal nature'”

Moreover, the Dutch Court of the first instance of Rotterdam had the same view. The court concluded that the arbitration clause was binding upon the third party because the

⁶Yearbook Commercial Arbitration XXVIII (2003)p. 593. (emphasis added)

reference was drafted clearly and referred specifically to the arbitration clause in the charter party.⁷

Furthermore, the Court of appeal of Athens concluded that a specific reference in the bill of lading is accomplished by stating: “*an arbitration clause binding for all ‘parties concerned’*”. The Court found that this reference was explicit and clear according to the standards and prevailing usages of the specific international trade. Therefore the Court concluded that the arbitration clause was binding upon the third party.⁸

However, some courts had the contrary view. The Philippines Supreme Court considered that a general reference is effective in order to bind the third party a reference in the bill of lading saying: ” all terms whatsoever” was considered valid and binding upon a third party.⁹

Among the legal systems a specific reference to the arbitration clause in the bill of lading seems to be sufficient to bring over the arbitration clause. However, there are still cases where general words of incorporation have been effective in order to bring over the arbitration clause into the bill of lading. Nevertheless, a general reference seems to be effective when the third party according to the circumstances should have been aware of the consequences of the incorporation. The thesis discusses below, the international convention of carriage of goods by sea provides similar rules on whether or not general or specific words are effective to bring over the arbitration clause into the bill of lading.

⁷Arrondissementrecht bank Rotterdam, 28 september 1995, Tijdschrift voor Arbitrage, 1996, pp.35-7

⁸ Yearbook Commercial Arbitration XXVIII (2003)p. 592-593

⁹ Second Division, Republic of the Philippines Supreme Court, 26 April 1990 no.1, Yearbook Comm. Arb'n Vol. XXVII(2002)r pp. 524-525

2.2 The Hamburg rules 1978 United Nations Convention on the carriage of goods by sea.

The convention on carriage of goods by sea, known as the Hamburg Rules 1978, has the merit of being the first convention that contains provisions in arbitration. Among its provisions, Art 22 (1) and (2) establishes the requirements of form in order to bind the third party to the arbitration clause. Art. 22 provides the following:

- 1. Subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that may arise relating to carriage of goods under this Convention shall be referred to arbitration.*
- 2. Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration and a bill of lading issued pursuant to the charter-party does not contain special annotation providing that such provision shall be binding upon the holder of the bill of lading, the carrier may not invoke such provision as against a holder having acquired the bill of lading in good faith.*

According to Art 22 the arbitration clause in a charter party incorporated by reference into the bill of lading is valid and binding upon the third party if:

- a) the arbitration agreement is evidenced “in writing”
- b) there is a specific reference in the bill of lading, saying that the arbitration clause in the charter party also binds the holder of the bill of lading when the holder is in good faith.

Three subsequent examples will illustrate when the arbitration clause intended to be incorporated into the bill of lading do not fulfil the criteria of Art 22:

1. A reference in the bill of lading saying that “*all conditions and exceptions as per charter party are thereby incorporated*” does not fulfil the criteria of Art 22 because the arbitration clause is not mentioned in the reference.
2. An express reference to the arbitration clause i.e. “*all terms, conditions, clauses and exceptions...contained in the said charter party apply to this bill of lading and are deemed to be incorporated herein*”. It does not meet the requirement under

Art 22 because it does not explicitly states that the arbitration clause applies to the legal relationship between carrier and third party. The form requirement is neither met even though the arbitration clause in the charter party read: *“Any dispute arising out of this Charter or any bill of lading issued hereunder shall be referred to arbitration”*. The express reference saying that the arbitration clause in the charter party binds the holder of the bill of lading must be made in the bill of lading.

The arbitration clause must be in writing and must expressly establishes that the arbitration clause is binding upon the holder of the bill of lading i.e. the reference in the bill of lading to the charter party saying “all terms, conditions, clauses and exceptions including the arbitration clause contained in the charter party apply to this bill of lading and are deemed to be incorporated herein” meets the form requirement under Art 22.2¹⁰

The form requirement of Art 22.2 has the purpose to ensure that the third party is aware about the consequences of the incorporation. This is achieved by a specific reference establishing that the arbitration clause binds the holder of the bill of lading as well.¹¹ However, a specific reference is only needed if the third party is a holder in good faith.

The Hamburg rules are silent to the question of *who is a holder in good faith*. We can infer that the carrier can invoke the arbitration clause against a holder of the bill of lading who according to the circumstances should have been aware about the arbitration clause incorporated i.e. because the parties had a long business relationship.¹²

Art 23.3 of the Hamburg rules has a relevant provision in respect to the application of the Hamburg Rules. Art. 23.3 establish the following:

“Where the bill of lading or any other document evidencing the contract of carriage by sea is issued, it must contain a statement that the carriage is subject to the provisions of this

¹⁰ Chistof F. Luddeke, Andrew Johnson, A Guide to the Hamburg Rules from Hague to Hamburg via Visby, Loyds of London Pres. Ltd 1991p.39

¹¹ Siig, Kristina. *Arbitration Agreements in a Transport Law Perspective*. Oslo, 2002. p 350

¹² Siig, Kristina. *Arbitration Agreements in a Transport Law Perspective*. Oslo, 2002,page 352

Convention which nullify any stipulation derogating therefrom to the detriment of shipper or the consignee.”

Therefore, the Hamburg rules are applicable if the bill of lading contains a stipulation saying that the contract of carriage is governed by the Hamburg rules. The purpose of such stipulation is to make aware the shipper that the contract of carriage is subject to the Hamburg rules. The other aim of the Art.23.3 is to impose the application of the Hamburg rules even in no Contracting States.

Under the Hamburg Rules, a carrier may invoke the arbitration clause against the third party if certain conditions are met. However, the solutions provided by the Hamburg Rules do not apply for all the countries. There is a large amount of countries that have not adopted the Hamburg Rules. Furthermore, there are countries that have their rules on arbitration that may differ from or may be similar to the provisions in the Hamburg Rules. We will discuss in following paragraphs the legal system of those countries.

2.3The legal systems and a tacit acceptance of the arbitration agreement

A construction of the bill of lading may infer the third party intention to be bound by the arbitration clause. If the third party accepts a bill of lading that contains a specific reference to an arbitration clause. However delicate questions arise from a tacit acceptance of the arbitration agreement among the legal system. The document-bill of lading- that contains the reference to the arbitration clause is issued unilaterally by the carrier. The third party does not consent expressly (by writing or signature) to the document containing the reference.

If we described this scenario according to the formation of contract, there is a written offer of an arbitration agreement contain in a document when the carrier issues the bill of lading and there is a tacit acceptance by the third party. The question is whether or not the arbitration agreement is valid when it is consent tacitly. Some legal systems have strict requirements of form when it comes to considering the validity of an arbitration agreement. While under some legal systems an arbitration agreement concluded tacitly is valid in others is not. The thesis discusses below the arbitration clause incorporated by reference into bill of lading under:

- 1) The legal systems that consider valid a tacit acceptance of the arbitration agreement.
- 2) The legal systems require an express consent to the arbitration agreement.

2.3.1 Validity of arbitration clauses incorporated by reference into bills of lading under the legal systems that consider the third party's tacit acceptance valid

Some legal systems consider that a tacit acceptance effective to bind the third party to arbitration. An example of those legal systems is the English Legal system.¹³ Under the English Legal system, if the third party accepts the bill of lading, he is regarded as having accepted the arbitration clause incorporated by reference. The reason lays down on the fact that if the third party accepts the bill of lading he is regarded as to have consented to the arbitration clause incorporated by reference.

This was pointed out by the author Vera Van Houtte¹⁴ as following:

“...This acceptance does not need to be explicit, but can result from the absence of protest, the performance without reserve of the agreement or the reception without protest of such documents as letters, invoices, etc. containing the reference to the general conditions...”

Moreover, under some legal systems, for instance the German Legal system, when the shipper/charterer indorses the bill of lading, he transfers his own rights and obligation existing under the document inclusive the arbitration clause to the indorsee. The bill of lading is conclusive evidence of the terms between the carrier and the holder.¹⁵

In the legal systems that consider a tacit acceptance valid of the arbitration clause, the knowledge is enough to evidence the third party's intention to consent to arbitration. If the third party knew or should have known of the arbitration clause, he grants a tacit

¹³ See Chapter 3.2

¹⁴ Vera Van Houtte, Consent to arbitration through agreement to printed contracts: The Continental experience, page 1,2, arbitration international vol. 16, no.1). p. 9

¹⁵ Trappe, Johannes. *The Arbitration Clause in a bill of lading*. Journal of International Arbitration vol.19. 2002 p. 342

acceptance of the arbitration agreement. Most of those legal systems regard specific words of incorporation as a way effective to incorporate the arbitration clause.

2.3.2 An arbitration clause incorporated by reference into the bill of lading under legal systems which requires an “express consent” of both parties to arbitrate

In contrast, there are legal systems that considered an arbitration agreement concluded tacitly invalid. As an example we can mention the French legal systems. Under the French legal system there must be an express consent of the third party. According to the description given above, the carrier issues a bill of lading unilaterally there is not a written acceptance by the third party. Therefore under this legal system the arbitration clause incorporated by reference into the bill of lading is not binding upon the third party.

The French Court of Cassation had the view that the third party is not bound by the arbitration clause because he had not consent expressly to it. The third party must have had knowledge of the arbitration clause and he must consent expressly to the document containing the reference.¹⁶ Therefore a specific reference should be made in order to ensure third party knowledge of the arbitration clause. In addition, the third party must consent expressly to the document containing the reference. Consequently, the arbitration clause is not binding upon the third party because he may not have the opportunity to consent expressly to the arbitration clause and to the document containing the reference. Nevertheless, the consignee may have this opportunity when the third party is a CIF buyer and before the discharge of the goods, he has received a copy of the charter party and has taken note of it and paid the price of the goods.¹⁷

The same view has the legal system of Uruguay consider the arbitration clause not binding upon the third party because the document containing the reference is not expressly

¹⁶ [1995] E.T.L.181

¹⁷ [1994]D. M.F. 211 AND 215

consent by the third party. The document is not expressly consent by a written acceptance or by the third party's signature.¹⁸

Consequently, under those legal systems, the arbitration clause incorporated by reference into the bill of lading does not bind the third party. Whether a specific or a general reference have been made in the bill of lading becomes irrelevant. The arbitration clause cannot be invoked by the carrier to a third party because he has not consent expressly to the document containing the arbitration clause. We now turn into the reasons for those legal systems which require an express consent to arbitration.

2.3.3 The reasons for an express consent to arbitrate

The exclusion of the courts natural jurisdiction

One of the reasons for the legal systems to consider that the arbitration agreement is valid if the third party consent expressly to the arbitration clause lays down in the importance of arbitration as excluding the natural right of the party to use the courts. Therefore, the form-requirement to evidence the party's consent for excluding courts natural jurisdiction is fairly strict. The arbitration agreement must be evidenced *in writing*. In writing mean under those legal systems the signature of both parties or the exchange of written communications concluding the arbitration agreement. These requirements ensure that the parties agreed to arbitration. As we will see below, those requirements of form are in accordance with the New York Convention 1958.¹⁹

Contract of carriage: The nature of a Contract of Adhesion.

Some other legal systems do not only consider the importance of the arbitration agreement as to it excludes the natural courts jurisdiction but also the nature of the bill of lading as the evidence of the contract of carriage which nature is a *contract of adhesion*. One example is Uruguay. Under the legal system of Uruguay the third party is considered the “weak party” in the legal relationship that arise from the bill of lading. The reason for such consideration lays down on that the shipper or subsequent holder/s has not had the

¹⁸ “Aromas S.R.L. c/Montemar S.A. y otra, buque Bilbao Express” (1996, 1997y 2001) , Sent. Interlocutoria 186 del 1/3/1996 (consentida) ; RTYS, Nro. 15, caso 283, p.23

¹⁹ Landau, Toby. *The Written Form Requirement for Arbitration Agreements: When “Written” Means “Oral”*, 11 ICCA Congress Series 19. 2003 p.22

opportunity to negotiate the conditions of the bill of lading.²⁰ The shipper or the endorsee of the bill of lading, are parties who simple have adhered to the contract of transport. Consequently, these legal systems impose strict form-requirements in order to protect the third party. An express consent to arbitration is necessary to bind the third party, therefore an arbitration clause accepted orally, tacitly or by performance is not valid.

The Form: Only a way of evidencing the third party's consent to arbitration

The writing requirement facilitates the question of whether or not an arbitration agreement was actually consented to and concluded. The writing form requirement functions as evidence of the conclusion of an arbitration agreement.

However in those legal systems, the requirement of *in writing* has a functional purpose in order to evidence the consent of the third party to arbitration. The writing form is “ad probationem”, it is not required “ad solemnitatem” as constituting the existence of the arbitration agreement.²¹ Therefore the question would be whether or not the arbitration agreement can be proved by other means. Under those circumstances the courts may consider that the arbitration clause has been consented orally, tacitly or by performance.

²⁰ Fresnedo de Aguirre, Cecilia. *El estado de situación del arbitraje comercial internacional en la jurisprudencia uruguaya*, De Cita, Derecho del Comercio Internacional temas de actualidad, arbitraje, Buenos Aires, 2004 Pág. 429.

²¹ Landau, Toby. *The Written Form Requirement for Arbitration Agreements: When “Written” Means “Oral”*, 11 ICCA Congress Series 19. 2003 p.22

3 The UNCITRAL Model Law and the Legal Systems that have adopted its Principles

3.1 The scenarios covered by Art 7(2)

The United Nations Commission on International Trade adopted the UNCITRAL Model law (thereafter UML) in arbitration on 21 June 1985. The UML is a template that the states are recommended by the United Nations to adopt in order to modernize their legislation on arbitration.

The UML provides that an arbitration agreement is valid if it is “in writing”. Art. 7 (2) establishes under which circumstances an arbitration agreement is considered to have been agreed “in writing”. Art 7(2) provides the following:

“An arbitration agreement shall be in writing [...] An agreement is in writing if it is contained in a document signed by both parties or in an exchange of letters, telex, telegrams or other means of telecommunications which provides a record of the agreement, or in an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract”.

An arbitration agreement in order to be valid according to Art 7(2) must be contained in a document signed by both parties or recorded in an exchange of written communications between the parties. The document signed or the exchange of communications between the parties may make reference to another document. Under this circumstances the question is whether or not Art. 7(2) cover the hypothesis of a tacit acceptance of the document that contains a reference to the arbitration clause. The second question is how the reference should be worded in order to make that clause part of the contract.

The thesis will discuss in the following paragraphs, whether the third party will be bind by the arbitration clause incorporated by reference into the bill of lading according to Art 7(2).

3.1.1 A tacit acceptance of the arbitration agreement: An scenario excluded by Art 7 (2)

According to Art 7 (2), there are two scenarios. The first scenario is an arbitration clause in a contract or an arbitration agreement signed by the parties. The second scenario is an arbitration clause in a contract or an arbitration agreement contained in an exchange of letters or telegrams.

The bill of lading which contains the arbitration clause incorporated by reference should be signed by the carrier and by the third party in order to be valid according to Art 7 (2). The bill of lading is issued by the carrier “unilaterally”. Therefore, the arbitration clause incorporated by reference into the bill of lading is not binding upon the third party, according to Art 7(2) first scenario.

While under the first scenario is clear that the arbitration agreement must be expressly consent through the signature of both parties, under the second scenario the formation of the contract offer-acceptance and their form plays an important role to infer third party's consent.²²

Under the second scenario, the arbitration clause or agreement should be evidenced in an exchange of letter or telegrams between the parties. It means that there must be a written offer of a contract containing a reference to an arbitration clause or an arbitration agreement, and there must be a letter or a telegram by the party to whom the offer was addressed, accepting the offer of the contract or the arbitration agreement.

When the shipper is not the charterer there is not possible exchange between the parties. The shipper who just delivers the cargo for shipment does not have any contractual relationship with the carrier. Therefore, the shipper does not ask for the issuance of any bill of lading.²³

²² Landau Toby, The Written Form Requirement for Arbitration Agreements: When “Written” Means “Oral”, 11 ICCA Congress Series 19 (2003). p.40

²³ See Trappe, Johannes. The Arbitration Clause in a bill of lading, Journal of International Arbitration 19 2002 LLOYD'S MARITIME AND COMMERCIAL QUARTERLY, THE ARBITRATION CLAUSE IN A BILL OF LADING, page 340

The second question is whether or not the arbitration clause is binding upon the consignee. Whether or not is binding upon the consignee depend on whether or not there have been between the consignee and the carrier any written exchange for the conclusion of the contract of carriage referring to an arbitration clause. However, there is not any possibility of exchange because the consignee and the carrier. The consignee acquires his rights in the bill of lading through the endorsement made by the shipper/charterer in the bill of lading. Therefore the consignee would not be bound by the arbitration clause in the bill of lading according to Art 7(2) because there is not written exchange of communications between them for conclusion of the contract of carriage evidenced in the bill of lading.

Art 7 (2) does not cover the scenario where there is a tacit acceptance of the arbitration agreement. Therefore the third party is not bound by the arbitration clause because there is not written acceptance of the document that contains the reference to the arbitration clause, in this case bill of lading.

Some countries noticed in the drafting of the UML that Art 7(2) did not regulate the situation arising from the bill of lading. In the discussion Norway's commission proposed the following addition to the last sentence of Art. 7(2):

*'if a bill of lading or another document, signed by only one of the parties, gives sufficient evidence of a contract, an arbitration clause in a document, or a reference in the document to another document containing an arbitration clause, shall be considered to be an agreement in writing'*²⁴

Furthermore, some countries that are about to adopt the UML in their legal systems have also noticed the absence of a provision regarding a tacit acceptance of the arbitration clause. As an example we can mention the draft of the Argentine Arbitration Act 2001 based on the principles of the UML. The Argentine arbitration draft added to Art 7(2) the tacit acceptance of the arbitration agreement.²⁵

²⁴ See U.N. Doc. A/CN.9/263 English version, the UNCITRAL MODEL OF INTERNATIONAL COMMERCIAL ARBITRATION. p.20 Emphasised added

²⁵ All Paula Maria , Consideraciones sobre el convenio arbitral en el arbitraje comercial internacional, De Cita, Derecho del Comercio Internacional temas de actualidad, arbitraje, Buenos Aires, 2004 p. 27

The author Gerold Herrmann proposed an extensive interpretation of art 7(2) in order to cover the scenario of a tacit acceptance by the third party of the document containing the reference to the arbitration clause. The extensive interpretation of Art 7(2) should be made on the grounds that it is a frequent practice in the shipping trade. Therefore, the third party should have been aware of the consequences of the incorporation.²⁶

3.1.2 Specific or general reference in order to make that clause part of the contract

The UML seems to give another vague solution to the question of an arbitration clause incorporated by reference into the bill of lading. Art. 7(2) provide that the reference should be made as to make that clause part of the contract. Therefore, whether or not general words of incorporation are effective in order to make the arbitration clause part of the bill of lading is left to the applicable national law.²⁷ Under this provision, the courts may consider valid general words or specific words of incorporation depending on the applicable national law.

The issue whether general words of incorporation or specific words of incorporation are effective to bring over the arbitration clause into the bill of lading is not settled among the national courts. Some of the national courts have decided that only specific words of incorporation are effective to bring over the arbitration clause to the bill of lading. While other courts have considered that under certain circumstances general words of incorporation will suffice to incorporate the arbitration clause. Art 7(2) leads to uncertainty about the matter.

²⁶ See Herrmann, Gerold "The Arbitration Agreement as the Foundation of Arbitration and Its recognition by the Courts ICCA Congress Series no. 6 (1993) p.45

²⁷ Trappe, Johannes. LLOYD'S MARITIME AND COMMERCIAL QUARTERLY, THE ARBITRATION CLAUSE IN A BILL OF LADING, p. 339

Some countries commissions in the discussion of the UNCITRAL drafting, being aware of the lacuna in art 7(2) proposed some solutions. Argentina proposed to add to Art 7(2) a requirement. The Argentine commission stated the following:

*“... the last sentence of paragraph 2 according to which a reference to a document containing an arbitration clause should be such as to make that clause part of the contract, should contain a requirement, or at least should be interpreted as to contain that requirement, that the party against to whom that arbitration clause is invoked has or ought to have been aware of the incorporation of the clause in the contract. The objective of this requirement or interpretation would be to protect the party from the application of an arbitration clause which is not usual in a particular trade if the party could not be expected to know and consent of the document being referred to”.*²⁸

Furthermore, some national laws which have adopted the UML’s principles have noticed the UML lacuna. Some national laws national laws added to that specific words of incorporation are effective to bring over the arbitration clause into the bill of lading. We look at some examples given by Pieter Sanderds²⁹:

“Germany (1998) made several changes and additions to Art 7 (2) in section 1031 of its new Book 10 of the CCP on Arbitration. In paragraph 2 of this article it is stated that the form requirement is deemed to have been complied with ‘if the arbitration agreement is contained in a document transmitted from one party to other party or by a third party to both parties and-if no objection was raised in due time- the contents of such documents are understood to be part of the contract in accordance with common usage. [...]In paragraph 4 it is stated that an arbitration agreement is also concluded by the issuance of a bill of lading, ‘if the later contains an express reference to an arbitration clause in a charter party...”

²⁸ See U.N. Doc. A/CN.9/263 English page 20, the UNCITRAL MODEL OF INTERNATIONAL COMMERCIAL ARBITRATION. (emphasis added)

²⁹ Prof. Pieter Sanders The work of UNCITRAL on Arbitration and Conciliation 2sd. and Expanded Edition, Kluwer, the Hague, London 2004, p.69.(emphasis added)

“Greece (1999) states in article 7(6) ‘the issued of a bill of lading, in which there is an express reference to an arbitration clause contained in a carriage of goods contracts, constitutes an arbitration agreement’ and in art 7(7) ‘Any lack is covered if the parties participate in the arbitral proceedings unreservedly’. Again a waiver.”

Germany and Greece require that a specific reference should be made in order to bring over the arbitration clause into the bill of lading. An arbitration clause intended to be incorporated by general words is not binding upon the third party under those legal systems. The purpose of a specific reference is to ensure that the third party has knowledge of the arbitration clause.

Some countries, as we have seen above, have adopted the UML principles. However, the countries have made wider the form requirement of Art 7(2). The purposes have been to cover a tacit acceptance of the arbitration agreement and define what reference shall suffice to incorporate the arbitration clause. Other countries may adopt the UML without additions. The consequences of a difference in the form of the arbitration between the countries may lead to inconsistencies between them. The aim of the UML to ensure harmonization about the form of the arbitration agreement may fail. Furthermore, Art 7(2) is consistent with other articles of the UML for instance Art. 35. The following paragraphs will illustrate the possible consequences that may arise from the adoption of different form of the arbitration agreement under Art. 35.

3.1.3 The original arbitration agreement or the duly certified copy

The exclusion of a tacit acceptance of the arbitration agreement is consistent with Art. 35 of the UML. Art. 35 provide the following:

“The party relaying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certificated copy thereof, and the original arbitration agreement referred to in Art 7 or a duly certificated copy thereof”

According to Art 35 the party seeking for enforcement of the award shall supply a duly certified copy or the original arbitration agreement. Under these circumstances the winning party may encounter procedural obstacles for the enforcement of the award. We can illustrate the hindrances by assuming a scenario. We can assume country X enacts an arbitration law adopting the UML without making any addition to the UML. An award is rendered in England base on an arbitration clause incorporated by reference into the bill of

lading against a third party. The third party does not carry out with the award voluntarily. Consequently, the winning party has to seek for enforcement of the award in the country X where the losing party has its assets.

The winning party seeking for enforcement of the foreign award may encounter a procedural hindrance in the Court of country X. The winning party will have to present to the court of country X, the original arbitration agreement or the duly certified copy thereof. Art. 35 ensure that the arbitration agreement must be accepted in writing so as to exclude cases involving acceptance by performance, conduct or tacitly. Art 35 was drafted in accordance with Art IV of the NY Convention which we will discuss below more in detail.³⁰

Under these circumstances the award rendered based on arbitration clause incorporated by reference into the bill of lading, may bear a procedural hindrance. However, this procedural obstacle should not lead to an unenforceable arbitration award.³¹

3.1.4 Current work on the UNCITRAL

The deficiencies in Art 7(2) and 35 were noticed by the United Nations Commission of International Trade. The written form of the arbitration agreement is currently under examination. The Commission has different Working Groups. Among those the Working Groups in Arbitration (thereafter W.G. II) and the Working Group in transport law (thereafter W.G. III) are dealing with the problems of the written form of the arbitration agreement.³²

The W. G. II drafted the scope of Art 7(2) wider. The W. G. II pointed out that Art. 7(2) was obscure leaving many scenarios not covered. The issue of a tacit acceptance of a document containing a reference to an arbitration agreement is being answer by W.G. II as following:

³⁰ Landau Toby The Written Form Requirement for Arbitration Agreements: When “Written” Means “Oral”, 11 ICCA Congress Series 19 (2003).p.26

³¹ See below 4.4.1 the discussion about Art IV

³² See U.N. Doc. A/CN.9/WG.II/XXXVI/CRP.1/ Add.2 Working Group II in Arbitration (6 March 2002).

“For the avoidance of doubt, the reference in a contract or a separate arbitration agreement to a writing containing an arbitration clause constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract or the separate arbitration agreement, notwithstanding that the contract or the separate arbitration agreement has been concluded orally, by conduct or by other means not in writing”

In addition the draft clarifies the issue that arise from Art 35:

“For Purposes of Art 35, the written arbitration terms and conditions, together with any writing incorporating by reference or containing those terms and conditions, constitute the arbitration agreement.”

The W.G. II has been working in the form requirement for the arbitration agreement. The draft has added the tacit acceptance of the arbitration agreement, however, has not specifically referred to the situation arising from the charter party-bill of lading.

Nevertheless, W. G. III in transport law is currently working on a draft instrument on the carriage of goods [wholly or partly] [by sea]³³. The issue of the form of the arbitration agreement is also addressed by the W.G. III. Moreover, W.G. III is discussing the specific issues that arise from the charter party-bill of lading.

In the draft the W.G. III agreed that the arbitration agreement should be evidenced in writing. However, Art 76 of the draft does not contain a definition of the writing requirement. Therefore the arbitration agreement according to the draft shall include a tacit acceptance of the arbitration agreement.

Furthermore, the draft establish that the form is required only “ad probationem”. The draft states the following:

”The agreement to arbitrate should be evidenced in writing. That expression should be understood in the sense that the written form of the arbitration agreement is required ad probationem and not ad valitatem. The form requirement aims at providing certainty as to the intent of the parties and at facilitating subsequent evidence of the will of the parties to submit their disputes to arbitration.”

³³ See U.N. Doc. A/CN.9/WG. III/WP.45 Working Group III on transport law (2ds March 2005)

The question of a reference of the arbitration clause in the bill of lading is being answered by the Working Group. According to the new draft the reference should be specific in order to bring over the arbitration clause into the bill of lading.³⁴ Art. 77 of the draft established the following:

” if a negotiable transport document or a negotiable electronic record has been issued, the arbitration clause or agreement must be contained in the documents or record or ‘expressly incorporated’ therein by reference.” Incorporation of an arbitration clause or agreement by reference has given rise to diverging interpretations by the courts, and the definitions by the conditions whereby an arbitration clause or agreement would be considered as valid when it is only incorporated by reference should be defined.”

According to these provisions a tacit acceptance of the arbitration agreement should be regarded as valid. An arbitration clause incorporated by reference into the bill of lading should be binding upon the third party when the reference is specific. However, the differences within the form of the arbitration agreement introduced by the drafts may lead to inconsistencies between the countries that adopt those drafts or have similar provisions and countries that have adopted the UML without the additions to Art 7(2).

The English legal system is an example of a legal system that has adopted similar solutions that the ones proposed by the Working Groups II and III. The reasons for adopting those solutions will be discussed in the following section.

³⁴ See U. N. Doc. A/CN.9/WG. III/WP.45 Working Group III on transport law (2ds March 2005)

3.2 Incorporation of an arbitration clause into a bill of lading by reference under English legal system

3.2.1 Introduction

The English Arbitration Act (thereafter referred to as EAA) 1996 came into force on 31 of January 1997. Some Sections of EAA reflect some provisions of the Model Law with a different wording though. For instance, the arbitration agreement should be made *in writing*. However, the scope of an arbitration agreement *in writing* is much wider than the one provided by UML.

Sect. 5 provides us with a definition of an arbitration agreement “in writing” as following:

1) *The provisions of this Part apply only when the arbitration agreement between the parties as to any matter is effective for the purposes of this Part only if in writing.*

2) *There is an agreement in writing:*

if the agreement is made in writing (whether or not signed by both parties)

if the agreement is made by an exchange of communications in writing, or

if the agreement is evidenced in writing

3) *Where the parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.*

4) *An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement*

5) *An exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one of the party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effects alleged.*

6) *References in this part to anything being in written or in writing include its being recorded by any means.*

The EAA 1996 gives a detailed description of what constitutes an arbitration agreement in writing. Under the EAA 1996 the terms of the arbitration agreement must be *in writing*.

However, the parties consent to those terms may not be *in writing*. The definition includes arbitration agreements accepted, orally, by performance or tacitly. Therefore, the third party may grant a tacit acceptance of the document-bill of lading- which contains the reference to the arbitration clause.

The next question is how the reference should be in order to bring over the arbitration clause into the bill of lading according to the EEA 1996. Section 6 (2) of the EAA 1996 addressed the issue of the incorporation by reference of the arbitration clause as follows:

“...the reference in an agreement to a written form of arbitration constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement.

Sect. 6 (2) has adopted the principles of the UML art 7(2). Therefore, Sec 6 (2) does not regulate expressly the situation of an arbitration clause incorporated into the bill of lading by reference.

The courts will have to interpret in each case whether the reference is such as to make the arbitration clause part of the bill of lading. Since the UK tradition builds up its legal system by means of court decisions, as it is the practice in all common-law countries. The courts have developed case law in order to provide what references in a contract will be effective to incorporate under that contract provisions of another contract.

Whether an arbitration clause has been incorporated into a bill of lading by reference from the charter party, it is a matter of construction of the bill of lading. In English law the main rule of interpretation is that of strict “verbatim interpretation”. It means that the document is considered to stand alone. The courts will construct the intention of the parties by interpreting the words in the document. Exceptionally, courts will construct the spirit of the contract according to the factual context and by reference to the subject matter. If there is evidence that the intent of the third party had been to be bound by the arbitration clause, the intention shall be constructed in that sense under English legal system.³⁵

³⁵ Siig, Kristina Maria. *Arbitration Agreements in a Transport Law Perspective*. Oslo 2003 p.138

We will analyse in the paragraph in the next section the case law prior and after the EAA 1996 in order to consider whether an arbitration clause has been incorporated into the bill of lading and under what circumstances a court will consider it a valid incorporation.

3.2.2 Specific words of incorporation versus General words of incorporation

Whether general words of incorporation or specific words will be effective to bring over the arbitration clause into the bill of lading was developed by case law in England. We turn now to look into some of the most relevant cases under English Legal system. Those cases were prior to the enactment of the EAA. However, the line of authority settled in those cases has not been changed by the EAA.

The first relevant case was- *Thomas & Co. v. Portsea Steamship Company*-. In this case the bill of lading included a general reference to the charter party.³⁶

The House of Lords concluded that the arbitration clause was not incorporated into the bill of lading if the reference is made by general words. The reasoning laid down on the fact that an arbitration agreement between carrier and shipper/charterer does not germane in the contractual rights and obligations that arise under the bill of lading. The House of Lords pointed out the importance of the contents of the arbitration clause which is to deprive the party to his natural right to take any dispute to court. Therefore, the House of Lords concluded that only specific words will incorporate the arbitration clause into the bill of lading from the charter party.

The same rationale was used in the case “*Aughton Ltd. v. MF Kent Services Ltd.*” In this case the Court stated the relevance of the arbitration agreement as to preclude the parties to their natural right to go to Courts. Therefore the arbitration agreement should be made in writing. In addition, the Court highlighted the collateral nature of the arbitration agreement. Therefore the English Court upheld that only specific words will incorporate the arbitration clause into the bill of lading.³⁷ Only specific words of incorporation grant the third party consent to the collateral agreement- the arbitration clause.

³⁶[1912] A. C. 1 H L

³⁷ [1991] 57 BLR 1.

Under English legal systems a specific reference shall be made to the arbitration clause in the bill of lading if it is intended to bind the third party. A reference to *all the terms conditions and exceptions* is not sufficient to bring over the arbitration clause. However, under certain circumstances a general reference will suffice to incorporate the arbitration clause into the bill of lading.

3.2.3 The Exception to the rule of specific words of incorporation

In some cases the English Courts ruled that general words will exceptionally incorporate the arbitration clause into the bill of lading, when the arbitration clause is wide enough to include disputes under the bill of lading.

The case *Annefield (1971) 1 all E.R. 394* laid down the exception. General words will suffice to incorporate the arbitration clause when the charter party specifically refers to disputes under the bill of lading, for instance such as:

*“all disputes, arising under the charter party and the bill of lading will be submitted to arbitration.”*³⁸.

The exception to the main rule that only specific words will incorporate the arbitration clause was also laid down in the case. - *“Excesses Insurance Co. Ltd. v C F Mander (1997)2 Lloyds Rep. 119- The English Court Stated the following:*

*“...subsequent endorsees might never have seen the charter party and in the absence of specific words of incorporation might not appreciate that they had become bound by provision in another contract which precluded them enforcing their rights in the court”. In addition the judge stated that general words will suffice when the contracting parties had access, at the time of contracting, to both the charter party and the bill of lading.”*³⁹

The exception to the rule would be in the case that the third party had access to the charter party at the time of acquiring the bill of lading.

In other cases the English courts, in interpreting Sec. 6 (2) of the English Arbitration Act 1996, held that general words of incorporation in a bill of lading would not be constructed as incorporating the terms of an arbitration clause in a charter party.⁴⁰

³⁸ Trappe, Johannes The Arbitration Clause in a bill of lading, Journal of International Arbitration 19 2002 LLOYD'S MARITIME AND COMMERCIAL QUARTERLY, THE ARBITRATION CLAUSE IN A BILL OF LADING, Page 340.

³⁹ Excesses Insurance Co. Ltd. v C F Mander (1997)2 Lloyds Rep. 119

⁴⁰ Trygg Hansa v. Equitas (1998), Owners of cargo v Delos shipping ltd. 2001 1 all er (Comm) 763.

We can conclude under the English legal system the general rule is that only specific words of incorporation will bring over the arbitration clause into the bill of lading. General words will suffice only when the third party, at the time of entering to the contract, had access to the charter party at the time of concluding the contract of carriage.

4 Validity of Arbitration Agreements and the New York Convention 1958

4.1 Introduction: Scope of the New York Convention

The New York Convention (thereafter NY Convention) is a successful instrument of the United Nations for the recognition and enforcement of arbitration agreements and foreign awards. The NY Convention imposes to the contracting state to recognize and enforce an arbitration agreement and/or the resulting foreign awards. The recognition of the arbitration agreement under the convention is ensured if the arbitration agreement is “in writing”. Art II (2) defines an arbitration agreement “in writing” as follows:

“... The term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”

The purposes of the drafters when providing a definition of an arbitration agreement *in writing* were to ensure that an arbitration agreement would be subject to recognition by the contracting states. The authors of the Convention by providing the form of the arbitration agreement established an *uniform rule*. The uniform rule provision was to avoid the unsatisfactory result of an unenforceable arbitration agreement due to the disparity in the answer regarding the form of the arbitration agreement among the national laws. The other purpose was to ensure that the party is aware that he is agreeing to arbitration⁴¹

Having these purposes in mind, we will analyze in the following paragraphs whether or not an arbitration clause in the charter party agreement incorporated by reference into bill of lading complies with an arbitration agreement *in writing* under Art II (2). Thereafter, we will examine whether or not the courts of some of the countries which have ratified the NY Convention have interpreted an arbitration agreement *in writing* uniformly. Finally, the consequences of not compliance with the *form* requirement of Art II (2) will be illustrated.

⁴¹ Van den Berg, Albert Jan. *The New York Arbitration Convention of 1958*. The Hague Institute, Netherlands 1981. p.172-

4.1.1 The scenarios described by Art II(2) and its correspondence to Art 7(2)

According to Art II (2) of the NY Convention, there are two scenarios. The first scenario is an arbitration clause in a contract or an arbitration agreement signed by the parties. The second scenario is an arbitration clause in a contract or an arbitration agreement contained in an exchange of letters or telegrams.

Those scenarios described in Art II(2) echoes with the scenarios described in Art 7(2). According to Art 7(2) a tacit acceptance of the arbitration agreement is not valid. Therefore, the arbitration clauses incorporated by reference is not binding upon the third party according to a literal interpretation of Art II (2).⁴² As a result some courts of the contracting states have interpreted liberally Art. II(2) in order to cover a tacit acceptance of the arbitration agreement. If a tacit acceptance of the arbitration agreement is regarded as valid, the other issue to be addressed is the incorporation by reference. What conditions should be met in order to regard a tacit acceptance of the arbitration agreement by the third party.

The NY Convention is silent about the issue of incorporation by reference incorporation by reference Art. II(2) of the NY Convention is narrower than Art 7(2). Art. II(2) is silent about the issue of incorporation by reference. Under this circumstance the first issue that arises is whether or not incorporation by reference is valid under the NY Convention. The second issue is how specific should be in order to bind the third party to the arbitration clause.

The lack of regulation of the incorporation by reference under the NY Convention has led to contradictory courts decisions on this matter. While some court decisions have considered the arbitration clause valid by a liberal interpretation of Art II (2) others courts considered the arbitration clause invalid by interpreting literally Art II (2).⁴³ In USA we find some examples of diverging court decisions in that respect.⁴⁴

Art. II(2) does not cover both of the issues arising from charter party-bill of lading: The tacit acceptance of the arbitration agreement and the incorporation by reference.

⁴² See above 3.1

⁴³ Di Pietro, Dominico. *Incorporation of Arbitration Clauses by Reference*, *Journal of International Arbitration*. Kluwer Law International, Netherlands 2004 .p. 452

Therefore, the Courts of the contracting States have implemented a liberal interpretation of Art. II(2) in order to include both issues. The following paragraphs will discuss how the courts have implemented a liberal interpretation of Art. II(2).

4.2 A liberal interpretation of Art II (2) of the New York Convention

The issuance of bill of lading under charter party containing an arbitration clause is a well known practice in the shipping industry. The written form requirement of the arbitration agreement is quite strict under the NY Convention in relation to actual business practices. The problem goes deeper than the exclusion of modern means of communications as email, faxes etc. Art II (2) does not contemplate the day by day international practice of concluding contracts by performance, orally or tacitly.⁴⁵

Consequently, some courts have constructed Art II (2) liberally in order to expand the scope of the form requirement. A liberal interpretation of Art II(2) has been achieved by the Courts of the contracting states by using different reasoning. The next sections presents the method implemented by the Courts for interpreting Art II(2) liberally.

4.2.1 An arbitration clause in a contract: deleting the comma

Some courts have interpreted Art II(2) liberally. The method implemented is the delectation of Art. II(2)'s middle comma. As a result the requirement of *signature* or "exchange" becomes excluded in respect to the arbitration clause in a contract. According to this interpretation a tacit acceptance of the arbitration agreement is valid. The arbitration clause in a charter party incorporated by reference into the bill of lading is valid and binding upon the third party.

⁴⁴ Davies, Martin. *Litigation fights back: avoiding the effect of Arbitration Clauses in Charter Party Bill of Ladings*. Copyright 2004 Jefferson Law Book Company Journal of Maritime Law & Commerce, www.lexis.com/research/retrieve?10.03.2005.

⁴⁵ Landau, Toby. *The Written Form Requirement for Arbitration Agreements: When "Written" Means "Oral"*. 11 ICCA Congress Series 19 (2003). p.20

This was the solution in the case at the United State First Instance Judgement Khan Lucas Lancaster Inc. Lark International ltd.⁴⁶ The Court constructed Art II(2) in two main divisions an arbitral clause in a contract and the other an arbitration agreement a) signed by the parties b) contained in an exchange of letters or telegrams. Based on this analyze the District Court stated that Lark's signature was unnecessary to the purchaser orders. The Court concluded that the orders represented an arbitral clause in a contract. Therefore, the signature or exchange was not required.

However, the analysis in the case Lancaster failed in the Court of Appeal. The reason laid on the fact that the interpretation of the first instance judgement was incorrect. The Court of Appeal concluded that a correct interpretation is an arbitration clause contained in a contract signed by both parties or contained in an exchange of letters or telegrams.⁴⁷

4.2.2 The meaning of the words “shall include” in Art. II(2)

Another method implemented by the Courts has been to interpret the words *shall include* illustrative. The words “shall include” under this interpretation does not mean *only*. The Hong Kong's Supreme Court considered that the English version of Art II (2) does not provide an exhaustive definition of an arbitration agreement in writing.⁴⁸ The definition is merely illustrative covering other ways of concluding the arbitration agreement for instance by a tacit acceptance.

The Hong Kong Supreme court has not been the only one that has interpreted the words “shall include” in that sense. The DAC when drafted the proposal for the enactment of the EAA, constructed also the words “*shall include*” illustrative as to include other forms of writing i.e. a tacit acceptance. Moreover, the DAC expressed that its provision was compatible with Art II (2) of the NY Convention because the words shall include should be interpreted as to including other written form.⁴⁹

⁴⁶ Khan Lucas Lancaster, Inc v. Lark Internacional Ltd., No 95 CIV. 10506, 1997 WL 458785 at * 8(S.D.N.Y. 11 August 1997)

⁴⁷ Courts of appeal 186 F.3d 210(2d Cir. 1999)

⁴⁸ Di Pietro, Dominico. *Incorporation of Arbitration Clauses by Reference*. Journal of International Arbitration, Kluwer Law International, Netherlands 2004 p.441

⁴⁹ Landau, Toby. *The Written Form Requirement for Arbitration Agreements: When “Written” Means “Oral”*. 11 ICCA Congress Series 19 (2003) p. 68

Furthermore, the interpretation that the words *shall include* should not be constructed exhaustively is consonant with the interpretation of the most authoritative interpreter of the NY Convention, Van den Berg.⁵⁰

However, the USA Courts has interpreted the words *shall* as a synonym of *must*.⁵¹ The author Toby Landua has criticized this interpretation, the reason is that the courts have focus in the word *shall* instead of the word *include*. According to Landau, is not a good interpretation because the courts have constructed the word *shall* without *include*. It is a too artificial interpretation of the words *shall include*.⁵²

Nevertheless, a lecture of the Spanish and French version is odd with this liberal construction of Art II (2). The two versions the French with the word *entend* and the Spanish with the word *denotara* that we can translate into the word *mean*. Those words do not leave any doubt that the words shall include shall be interpreted exhaustively.⁵³ Both versions do not exclude incorporation by reference when the reference is specific. However, the Spanish and French version excluded an arbitration agreement concluded tacitly. Consequently, the arbitration clause incorporated by reference into the bill of lading would not bind the third party.

⁵⁰ Gerold Herrmann. *The Arbitration Agreement as the Foundation of Arbitration and Its Recognition by the Courts, in International Arbitration in a Changing World*. ICCA Congress Series nro. 6. International Council for Commercial Arbitration, Conference, Bahrain, 14-16 February 1993, p.45

⁵¹ *Chloe Z Fishing Co; Inc v. Odyssey Re London Ltd.* (United State District Court, Southern District of California, 26 April 2000)

⁵² Landau, Toby. *The Written Form Requirement for Arbitration Agreements: When "Written" Means "Oral"*. 11 ICCA Congress Series 19 (2003). p.69

⁵³ "The French version of art II (2) reads: '[o]n entend par 'convention écrite' une clause compromissoire insérée dans un contrat, ou un compromis, signés par les parties ou contenus dans échange de lettres ou de télégrammes.' The phrase 'on entend', which can be translated into English "it is understood" seems much narrower than the phrase "shall include" employed in the English version and seems also to contradict what was advocated in the decision taken by the Supreme Court. Similar observation can be made with reference to the Spanish version according to which: '[l]a expresión 'acuerdo por escrito denotara una cláusula compromisoria incluida en un contrato o compromiso, firmados por las partes o contenido en un canje de cartas o telegramas'..." Di Pietro, Dominico *Incorporation of Arbitration Clauses by Reference*, Journal of International Arbitration, Kluwer Law International, Netherlands 2004. p.442

4.2.3 The interpretation of the New York Convention according to its spirit: An appropriate solution to the current deficiencies of Art. II(2)?

Other courts have constructed Art II (2) according to the spirit of the New York Convention. As it was stated above, the purpose of the writing requirement is to ensure that the party is aware that he is agreeing to arbitration. The third party awareness of the arbitration clause may grant a tacit acceptance. The sacramental forms, the “signature” of the parties or the “exchange” between the parties are set aside in the presence of the third’s party awareness about the consequences of the incorporation of the arbitration clause.⁵⁴

The Swiss Federal Tribunals stated in the case *Compagnie de Navigation et transporters S.A. v. MSC (Mediterranean Shipping Company) S. A.*, 16 January 1995(first Civil division)” that Art II (2) form requirements shall be set aside in the presence of a certain behaviour of the parties according to the rules of good faith that infer that the third party has been aware of the incorporation. i.e. the party’s awareness of the incorporation because the parties have had a long standing business relationship.⁵⁵

As Di Pietro has pointed out:

*“The third party knowledge about the arbitration clause should be inferred by the status of the parties, the specifying of the reference and the customs of the industry to which the parties belong.”*⁵⁶

These parameters are the same we have listed above.⁵⁷ We turn below to the discussion of those parameters.

4.2.4 The incorporation by reference: the wording to ascertain third party awareness about the incorporation

The interpretation of the Art II(2) according to its spirit has the purpose to ensure that the third party was aware of the consequences of the incorporation. Therefore, specific words of incorporation seem to be a fair way to ensure that the third party had knowledge of the consequences of the incorporation.

⁵⁴ Di Pietro, Dominico. *Incorporation of Arbitration Clauses by Reference*. Journal of International Arbitration, Kluwer Law International, Netherlands 2004 p.442

⁵⁵ Tribunal Federal,” *Compagnie de Navigation et transport v. Mediterranean Shipping company*,” January 1995(1996) XXI Yearbook Commercial Arbitration, pp. 697-8, nos 12 and 13.

⁵⁶ Di Pietro, Dominico. *Incorporation of Arbitration Clauses by Reference*. Journal of International Arbitration, Kluwer Law International, Netherlands 2004 p. 442

⁵⁷ See Above 2.3

The specific reference seems to be in accordance with the spirit of the NY Convention. This solution was given by the Italian Supreme Court. The Supreme Court upheld that only a specific reference of the arbitration clause meets the requirement of Art. II(2) to express the intention to refer disputes to arbitration. The Court stated that a general reference in the bill of lading does not bind the subsequent holder of the bill of lading.⁵⁸

However, whether general words or specific words of incorporation are effective to bring over the arbitration clause lacks of uniformity by the courts of the Contracting State. There are cases in which a general reference has been considered to be bind upon the third party. This is the case when the party against to who the arbitration clause is invoked had knowledge of it at the time the contract was concluded and the third party accepted the contract tacitly.

When the reference has not been specific the courts have found other reasoning in order to consider the arbitration clause valid. If there is a *long standing commercial relationship* between the parties or the party against to whom the arbitration clause is relied upon is an *experienced* trader that should have been aware of the incorporation. The German Bundesgerichtshof upheld that

“Trade usages can lead to the tacit conclusion of an arbitration agreement, as far as typical trade contracts of that trade are concerned and the parties involved are directly active in that particular trade.....special circumstances excepted, there is incorporation (of the arbitration agreement also in the absence of an explicit reference...the formal requirement in sect. 1027 CCP is no obstacle, because of the operation of sect. 1027(2)(arbitration agreement between merchants) The same can be said of the New York Convention Art. II, which allows reliance on an arbitration agreement concluded informally according to municipal law. “69

⁵⁸ “Granitalia v. Agenzia Maritima Sorrentini Corte di Cassazione, Sezioni Unite [Supreme Court, Plenary Session], 22 December 2000, no.SU 1328, Yearbook Comm. Arb’n XXVII(2002)

⁵⁹ Bundesgerichtshof, 3 December 1992,(1995) XX Yearbook Commercial Arbitration, p.668, no5

The French Court upheld that an award was not valid on the grounds that a general reference does not comply with Art II (2). The parties did not refer specifically to the arbitration clause in their exchange of written communication concluding the contract. However, the court pointed out that if the parties had had a long standing business relationship a general reference would have suffice for the purposes of Art II (2).⁶⁰

In contrast, some Court's decisions have considered irrelevant that the parties had a long standing commercial relationship or were experienced traders. The courts concluded that the arbitration clauses was invalid due to not compliance with the written requirement of Art II(2).⁶¹

The cases described above seem to infer that a specific reference should be made in order to bind the third party to the arbitration clause. However, a general reference would be effective to bind the third party to the arbitration clause. When the parties have a long standing business relationship or were experienced traders. Nevertheless, according to the last case mentioned there are still some uncertainties on whether general words of incorporation will be effective when there is a long standing business relationship between the parties or the parties were experienced traders. The safest side seems to be specific words of incorporation.

4.3 Incongruities between National Legal Systems in the Application of Article II New York Convention:

As it was stated above some legal systems have enacted laws under which arbitration clauses in charter party incorporated by reference into the bill of lading are considered valid and binding the third party. In addition, the form requirement of Art II (2) is under some critics. Art. II(2) does not give a satisfactory answer to the current needs of the international trade i.e. the not uncommon way of concluding contracts tacitly. Therefore, the idea of the minimum rule in Art II(2) is being challenged by the national courts who

⁶⁰ Bomar Oil v. N.V. v Enterprise Tunisienne d'Activites Petrolieres(ETAP), Rev. Arb. (1987)p.482; Yearbook XIII(1988) p.466,469-470.

⁶¹Landau, Toby. *The Written Form Requirement for Arbitration Agreements: When "Written" Means "Oral"*. 11 ICCA Congress Series 19 (2003). p .40

has constructed Art II (2) liberally in order to cover a tacit acceptance of the arbitration agreement and the incorporation by reference.

In virtue of the circumstances described above, the form requirement incongruity from legal system to legal system creates a huge uncertainty about the validity of the arbitration clauses incorporated by reference. Consequently, while under some legal systems the arbitration clauses incorporated by reference into bill of lading has been held valid. When those legal systems consider a tacit acceptance of the arbitration agreement valid and the reference has been specifically made. In other legal systems such arbitration clause has been defeated by a literal construction of Art II(2).

The determination of the validity of an arbitration agreement is relevant in the two stage of enforcement. When a national court is called upon to recognize an arbitration agreement and refer the parties to arbitration or when the court is requested to enforce a foreign award.

The following paragraphs will illustrate how the different criteria in relation to the form of the arbitration agreement may affect the validity of the arbitration agreement at both stages.

4.3.1 Enforcement of the arbitration agreement

Art II plays an important role when a court is called upon to referral to arbitration. The third party may challenge before courts the validity of the arbitration clause in charter party incorporated by reference into the bill of lading by virtue of Art II(3). The third party may challenge the validity on the grounds that the arbitration clause incorporated by reference does not fulfil the form requirement of Art II (2). Art. II provides the following:

- 1. Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.*
- 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.*

3. The court of a Contracting State, when seized of an action in a manner in respect of which the parties have made an agreement within the meaning of this article at the request of one of the parties, refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

The validity of the arbitration clause incorporated by reference is determined at the stage of enforcement by Art II (2) in relation to the form. As the thesis discuss above, the arbitration clause incorporated by reference is not binding upon the third party because it falls outside Art. II(2). We have also seen above, an interpretation of Art. II(2) according to its spirit may regard those arbitration clauses valid.

The different interpretation of Art II(2) may lead to incongruities between the Contracting States. We can assume various scenarios at the stage of enforcement of the arbitration agreement depend on whether the Court sized makes a liberal or a literal interpretation of Art. II(2).

We can assume three scenarios, under the first scenario a carrier relying on the arbitration clause pretend to enforce the arbitration clause against the third party before the Swiss Court. The reference in the bill of lading is made by general words. In addition, the parties had a long standing business relationship. The Swiss Courts interprets the NY Convention according to its spirit. Therefore, the Swiss Court considers a tacit acceptance of the arbitration agreement valid. Furthermore, the Court considers general words of incorporation valid in this particular case. The long standing business relationship between the parties infers that the third party should have been aware of the consequences of the incorporation. Consequently, the Swiss Court refers the parties to arbitration.

The same scenario but a different Court sized may lead us to a different result. We can assume that the Court sized is the Italian Courts. The Italian Courts consider the tacit acceptance of the arbitration agreement valid by a liberal interpretation of Art. II(2). However, a tacit acceptance of the arbitration clause is granted by the third party only when the reference is specific. The Italian Courts may not refer the parties to arbitration even though there was a long standing commercial relationship between the parties.

However, the scenarios described above may be completely different if the Court of another contracting State is sized i.e. Uruguayan Courts.

The Uruguayan Courts construct literally Art II (2). Consequently, an arbitration agreement that is not signed by both parties or embodied in an exchange of written

communications between the parties is not valid according to the Uruguayan Courts. Whether the reference is specific or general is irrelevant for the Uruguayan Courts. A tacit acceptance of a document containing the reference to the arbitration agreement is not valid because it does not comply with the reciprocity criteria under Art. II(2). The Uruguayan Courts have considered the arbitration clauses incorporated by reference into the bill of lading according to Art. II(3) null. Furthermore, the Courts have considered unanimously that the arbitration clauses in charter party incorporated by reference into the bill of lading are not binding upon the third party.⁶²

4.3.2 Enforcement of the foreign award:

Art V of the NY Convention regulates the enforcement of the foreign award. Art. V settled the grounds to refuse enforcement of the award. One of the grounds is the invalidity of the arbitration agreement. Art V1(a) provides the following

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

The validity of the arbitration agreement is determined according to the governing law of the arbitration agreement. The law governing the arbitration agreement is provided by the conflict rules given by Art V 1(a). One of the rules is party autonomy, (...)” *The agreement referred in Art II is not valid according to the law chosen by the parties*”. In the case that the parties have not chosen a governing law for the validity of their arbitration agreement, Art V 1(a) gives another conflict rule “(...) *the law of the place where the arbitral tribunal will have its seat*”.

⁶² Fresnedo de Aguirre, Cecilia. *El estado de situación del arbitraje comercial internacional en la jurisprudencia uruguaya*, De Cita, Derecho del Comercio Internacional temas de actualidad, arbitraje. Buenos Aires 2004 p.435.

By a literal interpretation of the provision, those laws, provided by the conflict rules of Art. V 1(a), shall be the ones that gives an answer to the question about the validity of the arbitration agreement. If according to the respective application of those laws, the arbitration clauses in charter party incorporated by reference are valid. The awards rendered base on such clause should be enforceable.

However, most of the national courts have not interpreted Art V 1(a) literally. Most of the courts and most of the authors construct Art V 1(a) in connection with Art II (2) of the NY Convention at the stage of enforcement of the award. The reason lays on the fact that literal interpretation of Art V 1(a) can lead to inconsistencies under the Convention i.e. while the arbitration clause would be unenforceable under Art II (2) in the stage of establishing jurisdiction in favour of an arbitral tribunal, the same arbitration clause could be held valid under the law applicable to the arbitration agreement at the stage of enforcement of the award.⁶³

Consequently, while the arbitration clause is valid according to the governing law, the arbitration clause may be defeated because it does not comply with the form requirement of Art II (2). This may lead to an unenforceable award.

We can assume the scenario, where the Spanish Court is called upon to recognize arbitration clause in a charter party incorporated by reference into the bill of lading. The Spanish Court recognizes the arbitration clause because interprets Art. II(2) liberally. Therefore the arbitration clause is deemed to comply with Art II(2) by the Spanish Court. In addition, the arbitration clause contained a choice of law the English law and the seat of arbitration England. The Spanish Court refer the parties to the arbitration in England. The arbitral tribunal that has its seat in England renders an award against the third party.

Thereafter, the losing party(third party) does not comply voluntarily with the award. Therefore the winning party has to seek for enforcement of the award in a country where the losing party has assets. If according to the legal systems of the court of enforcement, the validity of the arbitration agreement is determined according to a literal interpretation

⁶³ Van den Berg, Albert Jan *The New York Convention of 1958*, the Hague Institute, Netherlands, 1981, p. 284

of Art. V 1(a) i.e. an Italian Court. The applicable law is the English Law because failing a choice of the parties the governing law is the *lex arbitri*. Under English law the arbitration clauses incorporated by reference are valid. Therefore the Italian Courts enforce the award.

However, if the Court interpreted Art V 1(a) in connection with Art II as most of the national courts do. The arbitration clause may be considered invalid according to Art II because it does not comply with the form requirement of Art II.⁶⁴

Nevertheless, we can assume that the court of enforcement of the award does construct Art V 1(a) in connection with Art II (2) but interprets the form requirement of Art II liberally. The court of enforcement may consider enforceable the award. Art V 1(a) says that the enforcement of the award “may be refused” those words give to the court of enforcement discretion on whether or not to enforce an award.

It should be kept in mind that it is likely to expect that if the Court of enforcement constructs Art V 1(a) with the internal reference to Art. II and in addition, the court interprets Art. II conservatively the enforcement of the award based on arbitration clauses incorporated by reference would be refused. The same scenarios listed above serve us as an example of the different consequences that the different interpretation of Art II(2).⁶⁵

4.4 Art. IV of the New York Convention:

4.4.1 An obstacle to a liberal interpretation of Art II (2)?

We can assume the scenario where a national court is called upon to recognize the arbitration clause incorporated by reference in the bill of lading. The Court may refer the parties to arbitration by a liberal interpretation of Art II (2). Thereafter the arbitral tribunal renders an award based on that arbitration clause. Then the losing party (third party) does not comply voluntarily with the award therefore the winning party (the carrier) seeks for enforcement of the award in the country where the losing party has his assets. There the winning party may bear a procedural hindrance under Art IV at the court of enforcement.

⁶⁴ See Van den Berg, Albert Jan *The New York Convention of 1958*, the Hague Institute, Netherlands, 1981, p. 284

⁶⁵ See above 4.3.1

The winning party must supply to the court of enforcement according to Art IV the following:

“To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of application, supply:

The duly authenticated original award or the duly certified copy thereof;

b) The original agreement referred to in Article II or a duly certified copy thereof....”

The Arbitration clause in a charter party incorporated by reference into the bill of lading is issued unilaterally by the carrier and the third party acceptance is tacitly. Furthermore, as we have seen above the bill of lading may refer in general to the conditions of the charter party. Under those circumstances there is not an arbitration agreement “in writing” to present before the Court of enforcement of the award. Therefore the award may be defeated because of the impossibility to present the arbitration agreement.

There have been cases where the foreign award was unenforceable due to the impossibility to present the original arbitration agreement or the duly copy thereof.⁶⁶

There are a wide number of cases, where a liberal interpretation of Art II (2) had led to the Courts of the contracting States to regard the arbitration clause valid. However, there are uncertainties whether or not the award base on the arbitration clause incorporated by reference, will be enforceable.

Nevertheless, as we have seen above, enforcement of the award may be only refused in the presence of one of the grounds enumerated in Art V. The grounds in Art V contain an exhaustive list of grounds for refusal of the award. A procedural obstacle should not lead to an unenforceable award.⁶⁷

⁶⁶ James Allen (Ireland) Ltd. v. Marea Producten B.V.(Netherlands) in 1984[Yearbook X(1985)p.485]

⁶⁷ Moss Cordero, Giuditta, *Risk of conflict between the New York Convention and the Newer Arbitration friendly National Legislation?*, Stockholm Arbitration Report, 2003:2,p 15

4.5 The Uniform rule of Art II (2): The minimum rule function is being challenged.

As we stated above, the written requirement provided by Art II (2) has the purpose to ensure that the arbitration agreement will be recognized by the contracting States. Art II (2) is a “uniform rule” that functions as a maximum and as a minimum rule, superseding national laws.⁶⁸ The courts of the contracting States neither are allowed to demand stricter form requirements than Art II(2) nor can demand less requirements.

As we have seen above, the NY Convention expressly disregards tacit acceptance of the arbitration agreement. In addition, it is silent about the issue of incorporation by reference. Therefore the arbitration clause in a charter party incorporated by reference valid according to the respective national law may be considered invalid. This national law may be superseded by Art II (2) minimum rule.

The idea that Art II may function as maximum rule nowadays is supported by Art VII the most favourable provision. The UML and the new drafts proposals of the U.N. Commission on International Trade challenge the minimum rule. The next section presents a discussion of the reasoning for this challenge.

4.5.1 The Minimum rule and UNCITRAL

The idea that the Courts of the contracting States are not allowed to accept less strict requirement than those in Art II (2) is, however, being challenged by the UML and its new proposals. The United Nations recommended the States to adapt their national laws in arbitration according to the UML and their following proposals. These templates have the purpose to adapt the contracting states legislation to modern needs of the international trade which has not been answered by art II (2) of the NY Convention.

This observation was made by the Swiss Federal Tribunal in *Compagnie de Navigation et transport S.A. v. MSC(Mediterranean Shipping Company) S.A.*, 16 January 1995(1st civil division)⁶⁹ as follows:

⁶⁸ Van den Berg, Albert Jan. *The New York Convention 1958* the Hague Institute, Netherlands, 1981 p.178

⁶⁹ *Compagnie de Navigation et transport v. Mediterranean Shipping company*, January 1995(1996) XXI Yearbook Commercial Arbitration, pp. 697-8, nos 12 and 13

“Art II(2) must be interpreted in the light of the Model Law, whose wished to adapt the legal regime of the New York Convention to current needs, without modifying [the actual Convention]”⁷⁰.

As we have seen above, the UML includes incorporation by reference, in that respect the UML written requirement is wider than the Convention’s written form. However, the UML does not consider a tacit acceptance valid. Under this circumstance the arbitration clause incorporated by reference is not binding upon the third party. Nevertheless the latest proposal in order to answer these questions expanded UML scope of the arbitration agreements *in writing* to arbitration agreements concluded, orally, tacitly or by performance.⁷¹

Some courts have advocated that Art II (2) should be interpreted in the light of the proposed amended of the UML. Furthermore the courts of the contracting states have enacted laws according to the UML or in accordance with the UML new proposal. The Courts of the contracting States would apply their laws with more flexible requirements than Art II(2). Therefore, the minimum rule becomes meaningless. A tacit acceptance of the arbitration agreement should be regarded as valid. Consequently, an arbitration clause in a charter party incorporated by reference should be binding upon the third party.⁷²

4.5.2 Art VII of the New York Convention, the most favourable provision

Art VII provides the possibility for the Courts of the contracting States to apply their national laws containing more liberal form requirements than Art II (2). Art VII may support the idea that Art II(2) should be understood only as a maximum rule.

Art VII of the NY Convention in its relevant part establishes the following:

“1.The provision of the present Convention shall not...deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon...”

⁷⁰ Landau, Toby. *The Written Form Requirement for Arbitration Agreements: When “Written” Means “Oral”*, 11 ICCA Congress Series 19 (2003), p. 72

⁷¹ U.N. Doc. A/CN.9/WG.II/XXXVI/CRP.1/Add. 2 (6 March 2002), para 5.

⁷² See above chapter II the actual work of the UML

The uniform regime implemented by Art II(2) seems to be at odds with Art VII. The juxtaposition between the minimum rule and Art VII is becoming more notorious as more countries are enacting laws with more liberal forms requirements than Art II (2). It is relevant to look back on the legal context in which the New York Convention was drafted.

The aim of the authors of the New York Convention was to ensure that most of the States would ratify the convention. In legal context of 1958 and even until 20 years after arbitration was seen negatively as excluding the courts natural jurisdiction. Therefore, the strict form requirements were a way to protect a party from arbitration.

However, nowadays the legal context towards arbitration have changed, arbitration is being seen positively as a special court specialized in solving disputes in the international commercial trade. Currently the tendency is that most legal systems are enacting more flexible requirements of form with the aim of facilitate the recognition and enforcement of the arbitration agreements and foreign awards. The minimum rule should be disregarded in order to provide harmonization according to nowadays current needs of international trade.⁷³

Some national courts may consider valid an arbitration clause by applying its national law more favourable to the validity of the arbitration agreement.⁷⁴ Art VII can refer to the substantive law of the arbitration agreement under the national law a substantive test of consent may be fulfilled. The respective national court may apply the substantive law to clarify matters of form. If the requirements of form under Art II(2) are stricter than the substantive law. Therefore, minimum rule may be defeated by Art. VII ⁷⁵

It is relevant to point out that the Art. VII of the NY Convention only applies in the stage of enforcement of the foreign award. If national law or legal instrument is more favourable than Art. II (2) i.e. the national law of the place of enforcement of the award may contain

⁷³ Di Pietro, Dominico. *Incorporation of Arbitration Clauses by Reference*, Journal of International Arbitration, Kluwer LawInternational, Netherlands, 2004 p.446

⁷⁴ See Bundesgerichtshof (Supreme Court) 25 May 1970, Yearbook XI(1977) p.237

⁷⁵ Di Pietro, Dominico. *Incorporation of Arbitration Clauses by Reference*, Journal of International Arbitration, Kluwer Law International, Netherlands, 2004. p.448

that arbitration agreements concluded tacitly are valid and binding upon the third party. The arbitration clause incorporated by reference should be valid and the award rendered base on that arbitration clause should be enforceable according.

As we have seen above, under the Hamburg rules, an arbitration clause in a charter party incorporated by reference into the bill of lading is binding upon the third party if certain conditions are met.

These conditions are more favourable for the validity of the arbitration agreement than the ones contained in Art. II. Therefore under Art VII the most favourable provision the Hamburg rules should apply to the validity of the arbitration agreement over the form requirement established by Art II (2).⁷⁶

However, the question is whether a winning party seeking for enforcement of the award can rely only in part of the convention in Art. VII and disregards other provisions of the Convention i.e. Art IV.⁷⁷ Some arguments support the idea that is not possible to rely only in Art. VII and disregard others Arts of the Convention. Van den Berg has stated that the NY Convention is a self contained instrument which aim is only to protect arbitration agreements in writing according to the Convention⁷⁸

There is a strong argument that supports the idea of the application of the NY Convention in combination with more favourable provisions of national laws and other conventions according to Art. VII. The combinations of the provision of Art. V and VII imply that more favourable provision can be applied by the Nationals Courts. Art V establishes that

⁷⁶ Siig, Kristina Maria . *Arbitration Agreements in a Transport Law Perspective*. Oslo, 2002.p.328

⁷⁷ Landau, Toby. *The Written Form Requirement for Arbitration Agreements: When "Written" Means "Oral"*, 11 ICCA Congress Series 19 (2003).p.74

⁷⁸ Landau, Toby. *The Written Form Requirement for Arbitration Agreements: When "Written" Means "Oral"*, 11 ICCA Congress Series 19 (2003).p.74

the enforcement of the award *may be refuse*. The words may be refuse gives to the court of the contracting state wide discretion in whether or not refuse enforcement of an award.⁷⁹

Furthermore, some courts of the contracting states have accepted a fragmented application of two competing systems base on the argument that the combination aim to facilitate the recognition and enforcement of the awards.⁸⁰ Consequently, the award based on an arbitration clause incorporated by reference into the bill of lading may be enforced in the contracting State according to Art VII.

⁷⁹Di Pietro, Dominico. *Incorporation of Arbitration Clauses by Reference*, Journal of International Arbitration, Kluwer Law International, Netherlands, 2004. p.449

⁸⁰ X v. Y, Oberlandesgericht (Court of Appeal) Hamm, 2 November 1983, Yearbook XIV (1989) p.629

5 Conclusion

The legal problem involving arbitration clauses incorporated by reference into the bill of lading is that those arbitration agreements are concluded tacitly by the third party. I have classified the legal systems according to whether or not the Legal system requires a tacit acceptance of the arbitration agreement. We can conclude that legal systems that require an express consent to the document containing the reference to the arbitration clause will not regard those arbitration clauses valid. While the legal systems that consider a tacit acceptance of the document containing the reference to the arbitration clause will consider such arbitration valid clauses.

However, a tacit acceptance, under those legal systems, it is granted by the third party if he has been aware about the consequences of the incorporation. An specific reference to the arbitration clause may be effective to bind the third party. Exceptionally, a general reference will suffice if there has been between the parties a long standing commercial relationship or/ and the parties are experienced traders that should have been aware of the consequences of the incorporation. If those requirements are met the third party has granted a tacit acceptance.

Under the Hamburg Rules the criteria used to determine the awareness of the third party is similar to the one described above. The arbitration clause can be invoked against a third party, if the reference is specific enough that the third party by reasonable diligence should have been aware of the incorporation. In the case that the reference is not specific the arbitration clause can be still invoke against a third party who according to the circumstances should have been aware of the consequence of the incorporation i.e. the parties have had a long standing commercial relationship.

Under most national laws and Conventions the arbitration agreement should be made *in writing*, however the definition in writing differ among those laws and convention.

The UML provides that the arbitration agreement shall be *in writing*. The definition *in writing* means an arbitration agreement consent expressly by both party. The UML in that respect

was drafted in accordance with Art II of the New York Convention. The same correlation has Art 35 of the UML and Art IV of the New York Convention. The purpose was to ensure that the recognition and enforcement of the arbitration agreements and awards would not become threatend.

Only by a liberal interpretation of Art 7(2) the arbitration clause in charter-party incorporated by reference into bill of lading may be covered. In addition, Art 7(2) includes the provision of incorporation by reference. However, Art. 7 (2) does not specify how this reference should be made in order to consider the arbitration agreement valid. The words of Art 7(2) *such as to make that clause part of the contract* are too vague. The consequences may lead to divergent courts decision in relation to the wording of the reference. Those lacunas were noticed by the United Nations Commission in International Trade and the questions are being answered by both working groups II and III. Under the draft proposals is clear that the arbitration clause incorporated by reference into the bill of lading is binding upon the third party if the reference is specific.

The definition *in writing* under English Arbitration Act 1996 is wider than the UML. The terms of the agreement should be in written, however, the consent is not necessary to be made *in writing*. Therefore, under English legal system a tacit acceptance of the arbitration agreement is valid. An arbitration clause incorporated by reference into the bill of lading is valid.

Nevertheless, the EAA 1996 does not regulate what wording is necessary to bind the third party to the arbitration clause. Sect. 6(2) reflects the same rule as Art 7(2) of the UML. Therefore, the Courts of England has developed case law before and after the enactment of the EAA 1996 in order to solve the question of incorporation by reference. There is a recognized line of authority that only specific words of incorporation will bring over the arbitration clause into the bill of lading. The exception to this rule is that the third party have had access to the charter party at the time of conclusion of the contract of carriage evidenced by the bill of lading. This situation is quite improbable, therefore the arbitration clause will be recognize by the English Courts if is the wording of the reference is specific.

Under a literal interpretation of Art II of the New York Convention, the definition of an arbitration agreement in writing in Art II (2) does not cover a tacit acceptance of the

arbitration agreement. Consequently, the arbitration clause incorporated by reference into the bill of lading falls outside.

The requirements under Art II(2) are dislocated in relation to actual business practices. In addition, Art II(2) is silent in the issue of incorporation by reference. The legal context of nowadays have changed there is a strong favourable policy towards arbitration. Art. II form requirement is quite strict in relation to the tendency of most national legal systems that are enacting national laws containing a wider definition of an arbitration agreement in writing. It is fair to say that the NY Convention has become an instrument with aim to facilitate recognition and enforcement of the awards. Consequently, some courts of the contracting States has interpreted Art II(2) liberally in order to cover for instance a tacit acceptance of the document containing the reference to the arbitration clause and incorporated by reference. Those courts have implemented different criteria in order to cover those issues. Some Courts have deleted the comma in order to exclude the requirements of signature or exchange. Other Courts have interpreted the words *shall include* with an illustrative meaning as to include other definitions of arbitration agreements in writing.

Some Courts have interpreted Art II(2) according to the spirit of the Convention. The purpose of the Convention in providing a definition of an arbitration agreement in writing is to ensure that the party is aware that he is agreeing to arbitration. Therefore, the Courts that have interpreted Art II(2) have settle some parameters in order to identify whether or not a third party have been aware about the incorporation.

The main purpose of the specific words of incorporation seems to be compatible with the spirit of the New York Convention that the party, in order to be bound by the arbitration agreement, must have knowledge of the arbitration clause. The other two parameters if the parties have a long standing commercial relationship or were experienced traders that should have been aware about the incorporation seems to be good criteria to determine the knowledge of the third party when the words are not specific.

There is a huge disparity among the different courts of contracting states in relation to the validity of arbitration clause in charter party incorporated by reference into the bill of lading. Those uncertainties may lead to the unenforceability of the arbitration clause.

If the court called upon to refer the parties to arbitration constructs Art. II(2) literally the court may not refer the parties to arbitration. If the court interprets Art II(2) liberally. The carrier may encounter a different scenario and the arbitration clause may be regarded as valid.

In the stage of the enforcement of the award the scenario may be similar to the scenario described above. The winning party seeking for enforcement of the award may be able to enforce the award. If the court contracting State interprets Art V1(a) literally. In the case that the governing law has a more lax requirement of form than Art II(2). This scenario is quite improbable. Mostly of the Courts have constructed Art. V1(a) in connection to Art II(2) at the stage of the enforcement of the award. Therefore, unless the Court interprets Art II (2) liberally, enforcement of the award may be refused by the Court.

The winning party may encounter at the stage of enforcement of the award a procedural hindrance under Art IV. an award based on an arbitration agreement tacitly accepted may not be recognized by the courts of the contracting states.

Under Art VII the Court of the contracting State may apply the most favourable provision to the arbitration agreement. The award based on an arbitration clause incorporated by reference may be enforceable under this provision.

The arbitration clauses incorporated by reference lack predictability. The purpose of the New York Convention to harmonize the form requirement among the contracting states is being challenge by the disparity among the legal systems. Under this picture, neither the enforceability of the arbitration agreement nor the enforceability of the awards base on such arbitration clauses is predictable among the legal systems.

6 LIST OF ABBREVIATIONS

DAC: Departmental Advisory Committee

NY Convention: New York Convention 1958

EAA: English Arbitration Act 1996

UML: UNCITRAL Model Law 1985

UN: United Nations

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